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NO. 17

IN THE

Supreme Court of the United States

October Term, 1969

UNITED STATES OF AMERICA, *Appellant*

v.

JAMES D. KNOX, *Appellee*

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR JAMES D. KNOX

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LIST OF AUTHORITIES

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are added to those presented by the Government:

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

UNITED STATES CODE

"26 U. S. C. 7203 Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015 or section 6016), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851."

TEXAS PENAL CODE

"Art. 652a. Bookmaking; definition; penalty Accepting or placing wagers; punishment

Section 1. Any person who takes or accepts or places for another a bet or wager of money or anything of value on a horse race, dog race, automobile race, motorcycle race or any other race of any kind whatsoever, football game, baseball game, athletic contest or sports event of whatsoever kind or character; or any person who offers to take or accept or place for another any such bet or wager; or any person who as an agent, servant or employee or otherwise, aids or encourages another to take or accept or place any such bet or wager; or any person who directly or indirectly authorizes aids or encourages any agent, servant or employee or other person to take or

accept or place or transmit any such bet or wager shall be guilty of book making and upon conviction be punished by confinement in the State Penitentiary for any term of years not less than one (1) nor more than five (5) or by confinement in the county jail for not less than ten (10) days nor more than one (1) year and by a fine of not less than One Hundred ($100.00) Dollars nor more than One Thousand ($1,000.00) Dollars."

QUESTIONS PRESENTED

I. Whether a false statement prosecution under 18 U. S. C. 1001 can be maintained on allegations of failure to answer questions 5 (b) and 5 (c) of Internal Revenue Service Form 11-C?

II. Whether the filing of Internal Revenue Service Form 11-C - Special Tax Return and Application for Registry-Wagering prior to the decisions in *Marchetti v. United States,* 390 U. S. 39, 88 S. Ct. 697 and *Grosso v. United States,* 390 U. S. 62, 88 S. Ct. 709 was a voluntary waiver of Appellee's Constitutional immunities under the Fifth Amendment?

III. Whether Appellee can be prosecuted under 18 U. S. C. 1001 for alleged false statements, in Internal Revenue Service Forms 11-C - Special Tax Return and Application for Registry-Wagering involuntarily filed prior to the decisions in *Marchetti v. United States,* 390 U. S. 39, 88 S. Ct. 697 and *Grosso v. United States,* 390 U. S. 62, 88 S. Ct. 709?

STATEMENT OF THE CASE

Counts Five and Six charge that the Form 11-C Returns were filed by Knox on October 14 and 15, 1965. (Appx. 4-6). This was more than two years prior to the

decisions in *Marchetti v. United States,* 390 U. S. 39, 88 S. Ct. 709 and *Grosso v. United States,* 390 U. S. 62, 88 S. Ct. 709.

Knox raised his Fifth Amendment plea at the trial level in his Defenses and Objections to the indictment (Appx. 6-7). He was sustained by the trial court on the authority of *Marchetti* and *Grosso.* (Appx. 8)

Counts Five and Six do not charge affirmative misstatements. They allege only defects of omissions in the Form 11-C returns:

> ". . . in that the number, name, special stamp number, street address, and city and state of employees and/or agents engaged in receiving wagers in the said JAMES D. KNOX's behalf had been omitted from said Internal Revenue Service Form 11-C . . ." (Appx. 5-6).

SUMMARY OF THE ARGUMENT

I. As Counts Five and Six of the indictment do not charge affirmative false statements, but only failures to answer questions 5(b) and 5(c) of Internal Revenue Service For 11-C, the Counts do not charge offenses against the United States.

II. Knox's filing of Form 11-C Returns prior to the decisions in *Marchetti v. United States,* 390 U. S. 39, 88 S. Ct. 697 and *Grosso v. United States,* 390 U. S. 62, 88 S. Ct. 709 was involuntary and under the compulsion of 26 U. S. C. 4412 and 7203. He therefore did not waive his Fifth Amendment immunity. He timely raised the plea by urging it as a challenge to the indictment.

III. Assuming the Form 11-C Returns contained false statements, they can not be the basis of a criminal prosecution as the Returns were involuntarily filed. They were extracted by the Government under the compulsion of 26 U. S. C. 4412 and 7203 in violation of the prohibitions of the Fifth Amendment.

ARGUMENT

I.

Neither Count Five nor Count Six of the indictment charges an affirmative false statement; they charge only failures to answer questions 5(b) and 5(c) of Internal Revenue Service Form 11-C.[1] It seems fundamental that failure to answer a question or to make a statement can not be a false statement. Consequently, the counts do not charge false and fraudulent statements under 18 U. S. C. 1001. Counsel's research has produced no Federal decisions directly on the point but state court precedents hold that charges of perjury or false statements can not be grounded on failure to make statements, no matter how material the statements, if made, may have been. *People v. French* (Calif. 1933), 26 Pac. 2d 310; *People v. Dodge* (N. Y. 1961), 12 A. D. 2d 353, 212 New York Supp. 2d 526.

The State in *People v. French,* supra, charged that the defendant filed an application to Los Angeles County for poor person relief without including with the application a list of properties in which he claimed a legal or equitable interest: ". . . And the Defendant in said affidavit did

1. Examination of the photocopy of the blank form attached as the last exhibit in the Appendix discloses that these are the questions to which Counts Five and Six refer.

willfully and intentionally fail to state the nature, location and value of all property in which he, the said Defendant, had any interest."

It was the State's contention that the failure to furnish this information, which was required by the poor relief ordinance, constituted false statements or perjury. However, the Court affirmed a dismissal of the indictment on the fundamental premise that a failure to make a statement can not be a perjurious false statement:

> "It would seem so clear that discussion should be unnecessary either to illustrate or to establish the point that a criminal action against a defendant for the commission by him of the crime of perjury can not be maintained on an allegation that in making an affidavit he failed to make a statement of any fact, however relevant or material such fact, if made, might be to the subject-matter in hand, or however mandatory the rule might be by which he was directed or required to make such statement as a prerequisite to the accomplishment of the object of the affidavit."

In *People v. Dodge,* supra, it was argued by the prosecution that certain petitions to a City Council should be construed to contain false statements, because the Ordnance under which the petition was filed required allegations of certain facts which were not stated in the petition. The Court rejected the contention, holding that charges of perjury or false statements can not be based on failures to make statements:

> "It has been argued that the petitions should be read as containing the false statements alleged to have been made because the ordinance required proof of such facts as a prerequisite to the grant of relief,

and the petitions were presented pursuant to the ordinance. As we have stated, the ordinance did not require proof; but even if it did, a failure to make the statements alleged to have been made would not have constituted perjury. Perjury is not committed by failing to make a statement of a fact, no matter how relevant or material such statement, if made, might be to the subject matter in hand, and no matter how mandatory the rule might be requiring such statement to be made as a prerequisite to the accomplishment of the purpose of an affidavit."

To construe 18 U. S. C. 1001 as contended for by the Government would result in the flagrant injustices of subjecting every citizen to a criminal prosecution whenever he failed to answer a question or fill out a blank in any of the myriad forms daily submitted by the thousands to the innumerable Governmental agencies and bureaus. It is urged such was not the intent of Congress on enacting §1001, that it did not intend to abrogate the age-old concepts of perjury or false statements and to subject a citizen to five years in prison and a $10,000. fine for failure to fill out all the blanks in an agency form.

Analogous unintended results have been avoided by the lower courts in construing §1001. It does not penalize statements as to what might be in the future; the truth or falsity of such are incapable of proof as of the time the statements are made. *Kolaski v. United States* (5th Cir.) 362 F.2d 847. Mere negative, oral answers to questions propounded by Federal investigators are not "statements" within the meaning of §1001. *Paternostro v. United States* (5th Cir.) 311 F.2d 298; *United States v. Stark* (D.C. Md.) 131 F. Supp. 88; *United States v. Levin* (D. C. Col) 133 F. Supp. 88.

II.

The indictment charges that the alleged false statements were contained in Internal Revenue Service Forms 11-C, Special Tax Return and Application for Registry-Wagering filed on October 14 and 15, 1965. This was more than two years prior to the decisions in *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709. At the times of the filings the decisions of *United States v. Kahriger,* 345 U.S. 22, 73 S.Ct. 510, and *Lewis v. United States,* 348 U.S. 419, 75 S.Ct. 415, were on the books and left untouched by *Albertson v. SACB,* 382 U.S. 70, 86 S.Ct. 194. Consequently, at the times of the filings, Knox was faced with the potentials of prosecution under 26 U.S.C.A. 7203, imprisonment for one year, and a fine of $10,000.00, if he failed and refused to file the returns in response to the requirements of 26 U.S.C.A. 4412. Under these circumstances, Knox's filings of the returns were not voluntary acts, but rather were acts under the compulsion and duress of 26 U.S.C. 4412 and 7203 as then sustained by *Kahriger* and *Lewis,* supra. Thus the filings were not the result of a free choice. See *Garrity v. State of New Jersey,* 385 U.S. 493, 87 S.Ct. 616, and the cases therein cited. There this Court held that self-incriminating statements made by police officers under threats of discharge from their employment if they claimed their Fifth Amendment immunity were given under duress and so not admissible against them:

> "Where the choice is 'between the rock and the whirlpool', duress is inherent in deciding to 'waive' one or the other. It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress."

After the decisions in *Grosso* and *Marchetti* overruled *Kahriger* and *Lewis,* Knox timely raised the issue of his Constitutional immunity by his Defenses and Objections to the Indictment (Appx. 6), and the claim was sustained by the trial court. (Appx. 8) Though he earlier succumbed to compulsion, by raising the issue at the trial level he avoided a waiver. *Garrity v. State of New Jersey,* supra. His failure earlier to assert the privilege to the Treasury officials at the time he filed the returns was not an irretrievable abandonment of his Constitutional immunity. *Marchetti v. United States,* supra. Further, in *Grosso v. United States,* supra, this Court excused the failure to raise the Constitutional issue at the time of trial and permitted its being initially raised on appeal, because at the time of trial *Kahriger* and *Lewis* were authoritative:

> "Given the decisions of this Court in *Kahriger* and *Lewis,* Supra, which were on the books at the time of petitioner's trial, and left untouched by Albertson v. SACB, supra, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege."

See also the ruling in the second opinion of the Seventh Circuit in *United States v. Lookretis* (7th Cir.) 398 F.2d 64 in which it sustained a Fifth Amendment objection to the admissibility in evidence of a Form 11-C Return. Such ruling necessarily held that Lookretis had not waived his Fifth Amendment immunity by filing the Form 11-C Return prior to the decisions by this Court in *Grosso* and *Marchetti.* The first opinion by the Seventh Circuit in *Lookretis,* 385 F.2d 487, sustaining the conviction, was reversed by this Court in a per curiam opinion on the authority of *Marchetti.* See *Lookretis v. United States,* 390 U.S. 338, 88 S.Ct. 1097. Thus the history of the

Lookretis litigation establishes that a pre-*Marchetti* and *Grosso* filing of the Form 11-C Returns under the compulsion of 26 U.S.C. 4412 and 7203 as then sustained by *Kahriger* and *Lewis* is not a waiver of the Fifth Amendment immunity.

III.

It has long been established that one may not be punished criminally for a perjurious or false statement made to or before a Federal agency or committee that had no statutory authority to require the statement or testimony. *Christoffel v. United States,* 338 U.S. 84, 69 S.Ct. 1447 (Congressional Committee); *Viereck v. United States,* 318 U.S. 236, 63 S.Ct. 561 (Secretary of State); *United States v. George,* 228 U.S. 14, 33 S.Ct. 412 (United States Land office); *Williamson v. United States,* 207 U.S. 425, 28 S.Ct. 162 (General Land Office); *Brown v. United States* (8th Cir.) 245 F.2d 549 (Grand Jury); *Meyers v. United States* (D. C. Cir.) 171 F.2d 800 (Congressional Committee); *Shelton v. United States* (D.C. Cir.) 165 F.2d 241 (Department of Vehicles and Traffic of District of Columbia); *United States v. Icardi* (D.C. Cir.) 140 F.Supp. 383 (Congressional Committee).

Under the above authorities, Knox can not be prosecuted criminally for false statements, if any, contained in the Internal Revenue Service Forms 11-C—Special Tax Return and application for Wagering filed by him on October 14 and 15, 1965 if the Internal Revenue Service was not authorized to require the filing of the returns. This is answered by *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709, holding that the Fifth Amendment prohibits the Internal Revenue Service's requiring the filings.

Additionally, the applicable penal statute, 18 U.S.C. 1001 is limited to false statements as to "any matter within the jurisdiction of any department or agency of the United States." The effect of *Marchetti* and *Grosso* is that the Internal Revenue Service does not have jurisdiction to require Form 11-C Returns, that requiring the filing of such returns is not an authorized function of the Federal Government. See *United States v. Gilliland,* 312 U.S. 86, 93, 61 S.Ct. 518, 522 ("The amendment indicated the Congressional intent to protect the *authorized functions* of governmental departments and agencies. . .")

Because Knox filed the 11-C Returns involuntarily, under compulsion and duress the Government's basic authorities of *Dennis v. United States,* 384 U.S. 855, 86 S.Ct. 1840; *United States v. Kapp,* 302 U.S. 214. 58 S.Ct. 182; and *Kay v. United States,* 303 U.S. 1, 58 S.Ct. 468, are not controlling. In each of these cases the false statements were voluntarily filed for the purpose of obtaining benefits from the Government.

The Defendants in *Dennis* filed false non-Communist affidavits as a part of a conspiracy to obtain the services of the National Labor Relations Board on behalf of the International Union of Mine, Mill and Swelter Workers in purported compliance with the provisions of §9(h) of the *National Labor Relations Act.* In *Kapp* the false statements as to the identity of the producers of hogs were filed as a part of a conspiracy for the purpose of obtaining benefits under the *Agricultural Adjustment Act,* selling the hogs to the Government. In *Kay* the defendant falsely overstated the amount of her second mortgage on real estate for the purpose of obtaining more than due her from the Home Owner's Loan Corporation.

However, in neither *Dennis, Kapp* nor *Kay* were the Defendants under any compulsion or duress. They were not faced with penal sanctions for failure to file the statements. It is this circumstance that clearly distinguishes *Dennis, Kapp,* and *Kay* from Knox's case.

As demonstrated above (P. 8 to 10) at the time Knox filed the Form 11-C Returns he was faced with the compelling requirements of 26 U. S. C. 4412 as then sustained by *United States v. Kahriger,* 345 U. S. 22, 73 S. Ct. 510 and *Lewis v. United States,* 348 U. S. 419, 75 S. Ct. 415. He was additionally under the threat of criminal prosecution, imprisonment for one year, and a $10,000.00 fine if he wilfully failed or refused to file. 26 U. S. C. 7203. This Court has held that statements made under such circumstances are made under duress and so are not voluntary. *Garrity v. State of New Jersey,* 385 U. S. 493, 87 S. Ct. 616. Under the decisions in *Marchetti v. United States,* 390 U. S. 39, 88 S. Ct. 697, and *Grosso v. United States,* 390 U. S. 62, 88 S. Ct. 709, the compulsion and duress of 26 U. S. C. 4412 and 7203 was unlawful, being forbidden by the Fifth Amendment.

Is not the Government therefore here urging a novel position: That it can in violation of the Constitution by compulsive duress extract involuntary statements from a citizen and then prosecute him for falsities that may be contained in the coerced information. Does not the Government by the very urging of the point defeat itself! Does not the very statement of the point demonstrate its repugnance!

For further demonstration of this argument equate Knox's mental coercion and duress with physical torture. See *Garrity v. State of New Jersey,* supra. Then assume

that Knox made and filed false statements under the pressure of the thumb screw or the pull of the rack. Would the Government then argue that Knox could not challenge the Government's unconstitutional extraction of the statements!

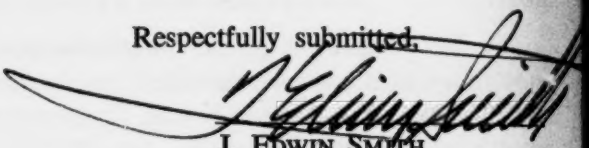
The Government required the statements from Knox in violation of its own fundamental law. It therefore comes against Knox with unclean hands. To permit the Government now to prosecute Knox for statements made in response to the Government's illegal acts would be to condone the Government's unconstitutional conduct. This the Courts have consistently refused to do under "the imperative of judicial integrity". *Mapp v. State of Ohio,* 367 U.S. 643, 81 S. Ct. 1684; *McNabb v. United States,* 318 U.S. 332, 63 S.Ct. 608. See also the concurring opinion of Mr. Justice Roberts in *Sorrells v. United States,* 287 U.S. 435, 453, 53 S.Ct. 210, 217; the dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Olmstead v. United States,* 277 U.S. 438 at Pages 469, 485, 48 S.Ct. 564 at Page 575 and *People v. Cahan,* 44 Cal.2d 434, 282 Pac. (2) 905, 50 A.L.R.2d 513.

The statements in the 11-C Forms having been unconstitutionally obtained by the Government under duress they would be inadmissible against Knox on a trial. *Garrity v. State of New Jersey,* supra; *Mapp v. State of Ohio,* supra; *McNabb v. United States,* supra; *Lookretis v. United States* (7th Cir.), 398 F.2d 64 (First opinion in 385 F.2d 487 being reversed by percuriam opinion in 390 U.S. 338, 88 S.Ct. 1097). This being so, the judgment below can be affirmed on the unavailability of necessary evidence though there has been no trial on the merits. 28 U.S.C. 2106. See *Grosso v. United States,* 390 U.S. 62, 71, 88 S.Ct. 709, 715.

CONCLUSION

Under the argument and authorities presented, it is submitted that the judgment below should in all things be affirmed.

Respectfully submitted,



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